Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

DAVID THOMAS HIGHTOWER, SR.,

Petitioner,

vs.

THE KENDALL COMPANY,
an unincorporated division of
TYCO INTERNATIONAL (US) INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Magistrate District Court Of The Northern District Of Georgia

PETITION FOR WRIT OF CERTIORARI

DAVID T. HIGHTOWER, SR. Pro se
1665 Westwood Ave. SW
Atlanta, Georgia 30310
(404) 595-1248

3188

QUESTION PRESENTED FOR REVIEW

Whether it is the Decision of Georgia state court as supported by the 11th Circuit Court of Appeals *Delgado v. Lockheed-Georgia Co., Div. of Lockheed Corp.* (1987, CA11 Ga), 815 F.2d 641, 646 decision; as opposed to the decision of the Georgia Department of Labor as supported by decisions of the Georgia Court of Appeals, Georgia Supreme Court, and the United States Supreme Court's decision in *University of Tennessee v. Elliott,* 106 S.Ct. 3226, 92 L.Ed.2d 635 (1986); Title 28 U.S.C. § 1738 and ultimately the United States Constitution, Article VI, Section II; that is preclusive to this instant action.

RULE 29.6 LISTING

Plaintiff

David T. Hightower, Sr. is the only interested person.

Defendant

Because the holdings and interest of TYCO International Inc. (Exeter, NH) as a multi-billion dollar conglomerate are vast and ever changing, Hightower must stipulate that the Rule 29.6 Listing that will be submitted by TYCO's legal defense team be accepted as most accurate.

TYCO's major subsidiaries as given in the Joint Certificate of Interested Persons filed in District court are:

ADT Worldwide Holdings; B. Braun-Dexon (Portugal, Spain); Confad Holding Corp. (DE); CVG Holding Corp. (US); Earth Tech Holding Corp. (US); Hawley Group Canada Ltd. (Canada); Intecva Sudamericana S.R.L.; Kendall Medical (US, Switz., Korea, Taiwan, Ireland, Italy); Modern China Giant Ltd. (HK); Narvik Valves; Nippon Sherwood Medical Ind. (Japan); NOMOS Holding S.A.; TYCO Holdings (DE); Kendall Holdings (GA); TYCO International (US) Inc.; INBRAND Corp.; Grinnell Corp. (US, Canada, France, Netherlands, Chile, Germany, Mexico, Venez.); Greene Insurance Ltd. (Cyprus); J. B. Smith Mfg. (US) Keystone International (Worldwide); TYCO Flow Control (US); Ludlow Corp. (US); Mueller Holdings Corp. (US); Polyken Tech. Europe Inc.; Simplex Tech. Inc. (US); TME Management Corp. (US) Water Holdings Corp. (DE).

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The opinion of the Magistrate District Court of the Northern District of Georgia in Hightower v. TYCO International is attached hereto in the Appendix (A), case number 1:98-cv-1591-CAM dated September 4, 1998.

STATEMENT OF JURISDICTION

On July 15, 1998 the 11th Circuit Court of Appeals dismissed this case for lack of jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1253, 1254.

CONSTITUTIONAL PROVISION INVOKED

This case involves portions of Article VI, Section II of the United States Constitution:

> "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding."

STATEMENT OF CASE

In January 1995, the very profitable manufacturer, TYCO International along with Kendall Corporation, a wholly owned subsidiary, announced a downsizing policy.

After TYCO announced the policy, the vast majority of TYCO managers laid-off employees in accordance to

the policy, allowing them to receive severance pay and unemployment benefits as they pursued their various occupations. However, TYCO's Atlanta distribution center managers elected to subject employees to a "run-off" thereby saving severance pay; and thereby not have to contribute to the employee's unemployment compensation which is required by law. Their actions would increase the Atlanta managers profit center and consequently their income.

Hightower was one of four employes who simultaneously received one week suspensions for allegedly failing to follow company loading policy. These four employees made up the entire second shift loading crew. Hightower exercised his right to appeal the action of the Atlanta managers through the company's "open door process". He was then fired for "theft and dishonesty, inability or willingness to perform work as required and neglect of duty".

The Atlanta distribution managers denied Hightower's final paycheck and transmitted their false accusations concerning Hightower to other non-privileged employees. By reason of the false and malicious statements, Hightower has been disgraced and has suffered humiliation. The false statement by TYCO managers were meant and were taken to mean by those hearing them that Hightower had stolen from the company and was a person who could not be trusted in employment.

Hightower applied for unemployment benefits. However, the Atlanta distribution center managers maliciously submitted their false accusations to the Georgia Department of Labor in order to deny Hightower's

unemployment benefits. In the Termination Notice which was the official document submitted by TYCO, the false accusations were repeated.

> "theft and dishonesty, inability or willingness to perform work as required and neglect of duty"

Any one of these three reasons for dismissal, selected by the TYCO managers, would have barred Hightower from receiving unemployment benefits. This was an illegal act on the part of TYCO's managers, pursuant to *OCGA 34-8-256(B).*

> **"Any officer or agent who knowingly makes a false statement or representation or fails to disclose a material fact in order to prevent or reduce the payment of benefits to any individual entitled thereto . . . shall be punished by fines and imprisonment. Each such act shall constitute a separate offense.**

After holding a hearing September 19, 1995 on the aforementioned issues submitted by TYCO, the Georgia Department of Labor as an administrative trier of fact determined that TYCO's accusations were false and held in favor of Hightower. TYCO was given fifteen days to appeal the decision but failed to do so. Therefore, as an agency commissioned by the state of Georgia, the Georgia Department of Labor's decision constitutes a final adjudication of the issues which were submitted by TYCO and provides collateral estoppel by state action of any additional adjudication of those issues by other tribunals.

After the Georgia Department of Labor's hearing, Hightower filed a civil action in Georgia state court for Wrongful Discharge and other Injuries to Personality sustained as a result of TYCO's malicious and illegal actions.

During the Georgia state court litigation, Kendall Company, the original defendant and wholly owned subsidiary of TYCO removed itself for the jurisdiction of the state of Georgia, which is one of the reasons which made a diversity action necessary.

In the diversity action filed June 4, 1998 in the Northern District of Georgia, Atlanta Division, both Hightower and TYCO contend that under the doctrine of res judicata they should prevail. Hightower's argument is based on the Georgia Department of Labor's decision. TYCO's is based on a favorable decision in Georgia state court.

Hightower argued that the Georgia Department of Labor's decision was preclusive and is supported by the United States Supreme Court's *University of Tennessee v. Elliott*, 106 S. Ct. 3226, 92 L. Ed. 2d 635 (1986), decision and by several decisions of the Georgia Court of Appeals and Georgia Supreme Court.

TYCO argued that the Georgia Department of Labor's decision was not preclusive citing the 11th Circuit Court of Appeals *Delgado v. Lockheed-Georgia Co. Div. of Lockheed Corp.* (1987, CA11 Ga) 815 F.2d 641, 43, ruling.

On September 4, 1998 Magistrate District Judge Willis B. Hunt granted summary judgment in favor of TYCO citing the res judicata doctrine as the basis for his decision and held that the decision of the Georgia Department of Labor was not preclusive citing the 11th Circuit Court of Appeals decision in *Delgado v. Lockheed-Georgia Co., Div. of Lockheed Corp.* (1987, CA11 Ga) 815 F.2d 641, 43 as the basis for his ruling.

Therefore a conflict exist as to whether the decisions of state agencies are preclusive.

Hightower appealed to the 11th Circuit Court of Appeals. Hightower's appeal was dismissed for lack of jurisdiction on July 25, 1999.

REASONS FOR GRANTING WRIT

1) THE MAGISTRATE COURT ERRED BY CONCLUDING THAT THE GEORGIA DEPARTMENT OF LABOR'S DECISION WAS NOT PRECLUSIVE.

The Magistrate Court concluded that the Georgia Department of Labor's decision was not preclusive to this action. However, in *University of Tennessee v. Elliott*, 106 S. Ct. 3226, 92 L. Ed. 2d 635 (1986), the United States Supreme Court addresses the issue of preclusion relative to the decisions of state agencies. The U.S. Supreme Court clearly states that:

> "Accordingly we hold that when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's court."
>
> Chief Justice William H. Rehnquist

The Georgia Department of Labor is such an agency with judicial authority. *OCGA 34-8-70(C)* states that the Commissioner shall have an official seal, which shall be judicially noticed. In addition the Georgia Department of Labor is given the power in the discharge of its duties as follows:

> "The Commissioner, the chief administrative hearing officer, the members of the board of review, and any duly authorized representative of any of them shall have the power to administer oaths and affirmations, take depositions, certify official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim." *OCGA 34-8-88*

The disputed issues of fact submitted by TYCO were: theft and dishonesty, inability or unwillingness to perform work, and neglect of duty by Hightower. These issues were properly before the Georgia Department of Labor, because they are essential to the determination of claim eligibility, as any one of these issues can prevent claimants from receiving benefits, pursuant to *OCGA 34-8-194*.

Although TYCO admits to the illegal act of submitting the aforementioned issues to the Georgia Department of Labor, TYCO contends that it did not submit evidence at the hearing and therefore the unopposed Georgia Department of Labor's decision is not preclusive[1]. However, TYCO's argument has already been rejected by the Georgia Court of Appeals:

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[1] TYCO was asked by the Georgia Department of Labor's hearing officer "exactly what was stolen". TYCO's representative was at a loss for words as it was revealed that TYCO's allegations were shamefully untrue. So, TYCO's claim that no evidence was presented at the hearing is a basis for denying preclusion to the Georgia Department of Labor's decision is unfounded. No evidence was presented as a result of TYCO not having any evidence, not because TYCO did not have

> "Yamaha's argument that the statements of McGahee's accusers who failed to appear at the hearing should have been considered, lacks merit."

McGahee v. Yamaha Motor Manuf. Corp., 214 Ga. App. 473, 448 S.E.2d 249 (1994).

Therefore the decision of the Georgia Department of Labor meets the requirements put forth by the U.S. Supreme Court for preclusion in that it is a state agency acting in a judicial capacity resolving disputed issues of fact properly before it which the parties have had adequate opportunity to litigate.

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an opportunity to present evidence. Throughout this litigation process, TYCO's legal defense team has continually dealt in this type of "half truth". Also, TYCO was given 15 days to appeal. TYCO did not appeal, making the Georgia Department of Labor's decision final.

Since Hightower had proclaimed through the entire litigation process that he had not stolen anything nor had he done anything wrong, the Magistrate District Court needed only to exercise the same wisdom exhibited by the Georgia Department of labor's hearing officer and ask TYCO "exactly what was stolen", instead of creating a conflict relative to the preclusion of state agency's decisions.

It must also be noted that several other TYCO employees had been terminated from employment and denied unemployment benefits as a result of the false Termination Notices submitted by TYCO to the Georgia Department of Labor. Because Hightower insisted that a hearing be held, TYCO's illegal actions were revealed.

Although TYCO received hundreds of millions of dollars in annual revenue from the state of Georgia, TYCO chose to file false Termination Notices with the Georgia Department of Labor to keep from paying its share of unemployment benefits.

2) THE MAGISTRATE DISTRICT COURT ERRED BY EXTENDING THE DOCTRINE OF RES JUDICATA TO THE BARRED FROM SUBJECT MATTER, NON-JURISDICTIONAL AND THEREFORE MOOT DECISION OF GEORGIA STATE COURT.

Georgia state court did not have subject matter jurisdiction over the issues and did not have jurisdiction over the defendant.

The state court of Georgia was barred under the doctrine of collateral estoppel by state action from rendering a decision relative to the issues which were submitted by TYCO to the Georgia Department of Labor.

> "The state court is not authorized to weigh the evidence or substitute its fact findings for those of the administrative trier of act."

McGahee v. Yamaha Motor Manufacturing Corp., 214 Ga. App. 473, 448 S.E.2d 249 (1994); *TNS Mills v. Russell*, 213 Ga. App. 14, 443 S.E.2d 658 (1994).

Once a commission of the state of Georgia has rendered a decision and the period for appeal expires, there can be no further litigation of those issues in state court, pursuant to *OCGA 34-8-223.*

Therefore, the Georgia state court is barred under the doctrine of collateral estoppel by state action and its decision cannot meet the requirements of the doctrine of res judicata because the state court did not have subject matter jurisdiction over the issues.

Additionally, it was discovered that during Georgia state court litigation, Kendall Company, the original defendant and wholly owned subsidiary of TYCO,

removed itself from the jurisdiction of the state of Georgia making a diversity action necessary. This claim is substantiated by a letter from the Georgia Secretary of State which was presented to the Magistrate Court. (see Appendix)

Therefore, Georgia state court did not have jurisdiction over the defendant and its decision does not meet this very important doctrine of res judicata requirement. It was the court's Mandatory Disclosure requirements that revealed where the liability for this instant action should be placed within TYCO's large and complex organizational structure.

The magistrate district court appears to have profoundly erred by extending the well settled doctrine of res judicata to the barred from subject matter, non-jurisdictional and therefore moot decision of Georgia state court.[2]

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[2] It appears that the Magistrate District Court would rather extend the doctrine of res judicata to the barred from subject matter, non-jurisdictional and moot decision of Georgia state court; then adhere to the United States Supreme Court's decision which is directly applicable to this case. Certainly, this is a peculiar decision by the Magistrate Court at best. Especially when the Magistrate Court was required by FRCP 56(c) to view the case in the most favorable light to the adverse party before rendering Summary Judgment.

3) THE MAGISTRATE DISTRICT COURT MISAPPLIED THE 11th CIRCUIT COURT OF APPEALS *DELGADO v. LOCKHEED*, DECISION IN ITS CONCLUSION THAT THE GEORGIA DEPARTMENT OF LABOR'S DECISION WAS NOT PRECLUSIVE.

After TYCO realized that all of its Affirmative Defenses were dissolved and that the Georgia state court decision was moot, TYCO elected to challenge the United States Supreme Court's *University of Tennessee v. Elliott*, decision. Surprisingly, the Magistrate District Court followed TYCO's lead, thereby creating a conflict which needs to be resolved by the Court.

The Magistrate Court accepted TYCO's one line summary of the *Delgado v. Lockheed* decision which is included in the Magistrate's ruling.

> "We decline to grant preclusive effect to the unreviewed state agency determinations,"

thereby giving the impression that the 11th Circuit Court of Appeals is unsupportive of the Court's decision. However, the 11th Circuit Court of Appeals goes on to state:

> "Nevertheless, the Court has frequently fashioned federal common law rules of preclusion where *Title 28 U.S.C. 1738* does not apply. In the context of administrative fact finding, the Court has upheld issue preclusion in subsequent lawsuits where the administrative agency acted in a judicial capacity in resolving disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . we find it unnecessary to determine whether the findings of a state administrative agency should be denied preclusive effect in all cases."

The 11th Circuit Court of Appeals explained in its decision that just as the U.S. Supreme Court concluded in the *University of Tennessee v. Elliott* case that a federal common law rule of preclusion would be inconsistent with congress' intent in enacting *Title VII;* the 11th Circuit Court of Appeals concluded that as a result of the common purpose shared by the *Title VII* and *ADEA* statutes that the deferral provision should be similarly interpreted and that preclusion to the state agency's decision be denied. However, TYCO has presented no *Title VII, ADEA* or any claim that warrants setting aside the preclusive decision of the Georgia Department of Labor. Therefore, the Magistrate District Court has no reason or basis for its conclusion that the state agency's determination is not preclusive.

The 11th Circuit Court of Appeals also stated as a basis for its decision that four of the plaintiffs in the *Delgado v. Lockheed* case never received a hearing before the Georgia Department of Labor and did not have an opportunity to litigate. TYCO did have a hearing and an opportunity to litigate but could not produce evidence to support its claims, because its claims were not true.

Therefore, the Magistrate District Court, in following TYCO's lead, appears to have misinterpreted the 11th Circuit's decision in the *Delgado v. Lockheed* case as being a basis for denying preclusion to the Georgia Department of labor's decision; and has rendered a decision which is contrary to that of the United States Supreme Court.

Moreover, *Title 28 U.S.C. § 1738* clearly states that:

> "The records and judicial proceeding of any court of any state shall have the same full faith

> and credit in every court within the United States as they have by law or usage in the courts of such state from which they are taken."

Because the Georgia Department of Labor's decision is preclusive under Georgia law, it should have the same "full, faith and credit in every court within the United States" which includes the Magistrate District Court of the Northern District of Georgia. Therefore, the Magistrate Court appears to have made an error by not granting preclusion to the Georgia Department of Labor's decision according to federal law.

The *United States Constitution*, Article VI, Section II states that the:

> "Constitution, and the Laws of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Because the Magistrate District Court's decision appears to be contrary to the "Laws of the United States" it cannot constitutionally be allowed to stand.

All of the aforementioned citations and binding authorities which include the *United States Supreme Court's University of Tennessee v. Elliott* decision, *Title 28 U.S.C. § 1738* and the *United States Constitution, article VI, Section II* were presented to the Magistrate District Court in the proceedings below. All were ignored, thereby demonstrating the need for the Court to exercise supervision of the Magistrate Court in this matter.

CONCLUSION

It is important that the Court hear this case because as a result of the Magistrate District Court decision, there is a conflict of law that needs to be resolved by this Court. On one side the Magistrate District Court has decided that the fact finding of state agencies is not preclusive and that it is supported in its position by the 11th Circuit Court of Appeals *Delgado v. Lockheed* ruling. On the other side the Georgia Court of appeals, Georgia Supreme Court and the United States Supreme Court by virtue of the *University of Tennessee v. Elliot* decision holding that the decisions of state agencies are preclusive, which is also in accord with the "full faith and credit" provision of *Title 28 U.S.C. § 1738* and ultimately the *United States Constitution, Article VI, Section II.*

Therefore, Hightower respectfully prays that the Court will resolve this conflict by up holding its own decision in this matter and reverse the decision of the Magistrate District Court.[3] This action by the Court would entitle Hightower to a Direct Verdict in his favor

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[3] If the Court does not uphold its own decision, no one else will feel obligated to do so. As in this case, the magistrate District Court of the northern district of Georgia has shown what appears to be blatant disregard for the United States Supreme Court's authority and the Court's decision which was written by the Chief Justice. Nor is it fair to the Districts and Circuits that have steadfastly supported the Court in its decision, for now other Districts and Circuits decisions are in conflict with the decision of the Magistrate court.

for his Complaint for Injury to Personality and a modest financial award in relief.[4]

Respectfully submitted,

David Thomas Hightower, Sr.
1665 Westwood Ave. SW
Atlanta, Georgia 30310
(404) 595-1248

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[4] Provision for Injury to Personality covered by: *Georgia State Constitution, Article I, Section I, Paragraph I; OCGA 51-1-6; OCGA 51-1-8; OCGA 51-10-1; Woods v. Local 613, IBEW,* 404 F. Supp. 110 (N.D. Ga. 1975); *Horne v. Skelton,* 152 Ga. App. 654, 263 S.E.2d 528 (1979).

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DAVID T. HIGHTOWER, SR., Plaintiff v. THE KENDALL COMPANY, an unincorporated division of TYCO INTERNATIONAL (US) INC., Defendant	)	CIVIL ACTION FILE NO. 1:98-CV-1591-WBH (Filed Oct. 1, 1998)

ORDER

Pro se plaintiff David Hightower filed this diversity action on June 4, 1998, alleging that his former employer's conduct regarding his termination harmed his reputation and ability to earn a living. On September 4, 1998, the Court entered an order [14] granting defendant's motion to dismiss on the grounds that res judicata bars Hightower's claims in the instant action because he was required to bring the instant claims, if at all, in a prior state court action that arose out of the same nucleus of operative fact. Now before the Court are Hightower's motions for reconsideration [17-1] and for a directed verdict [17-2].

DISCUSSION

A motion for reconsideration is not an opportunity for the moving party to instruct a court on how the court "could have done it better" the first time. *Preserve Endangered Areas of Cobb's History v. United States Army Corps of Engineers*, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995). Because reconsideration offends the strong policy favoring finality of judgment, Federal Rule of Civil Procedure 60(b) provides relief from judgment or order only in "exceptional circumstances." *Rice v. Ford Motor Co.*, 88 F.3d 914, 919 (11th Cir. 1996) (quoting *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984)). Absent the discovery of new evidence, an intervening development or change in the controlling law, or binding authority contrary to the court's decision, it is inappropriate for a district court to vacate or modify a previous order on a motion for reconsideration. *Preserve Endangered Areas of Cobb's History*, 916 F. Supp. at 1560-61.

Hightower has presented none of the above. Instead, he bases his current motions on his claim that a prior Georgia Department of Labor decision in his favor on an unopposed unemployment compensation claim entitles him to a decision in his favor in the instant case. The Eleventh Circuit rejected such an argument in *Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 647 (11th Cir. 1987) ("[W]e decline to grant preclusive effect to the unreviewed state agency determinations"). Accordingly, Hightower's motion for reconsideration must be DENIED, and his motion for a directed verdict must be DENIED AS MOOT.

CONCLUSION

For the reasons stated above, the Court DENIES Hightower's motion for reconsideration [17-1] and DENIES AS MOOT Hightower's motion for a directed verdict [17-2].

It is so ORDERED this 16 day of October, 1998.

/s/ Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge,
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DAVID T. HIGHTOWER, SR., Plaintiff v. THE KENDALL COMPANY, an unincorporated division of TYCO INTERNATIONAL (US) INC., Defendant	)	CIVIL ACTION FILE NO. 1:98-CV-1591-WBH (Filed Sept. 04, 1998)

ORDER

Pro se plaintiff David Hightower filed this diversity action alleging that his former employer's conduct regarding his termination harmed his reputation and ability to earn a living. Before the Court are defendant's motions to dismiss the complaint [8-1] and for sanctions under Federal Rule of Civil Procedure 11 [8-2]. For the reasons that follow, the Court GRANTS the motion to dismiss and DENIES the motion for sanctions.

BACKGROUND

Hightower was employed as a truck loader at defendant's warehouse for approximately eight years until his discharge on August 28, 1995 for repeatedly failing to follow company loading policy. He then filed a wrongful discharge action in the State Court of Fulton County

(Georgia) in which he contended that defendant made "mean spirited," false, and misleading statements to the Georgia Department of Labor in order to deny him unemployment benefits. The trial court granted summary judgment to defendant on all claims, and also imposed a $1,268.38 sanction on Hightower for pursuing frivolous litigation. The Georgia Court of appeals affirmed, and assessed an additional $500.00 penalty on Hightower for filing a frivolous appeal. Hightower then filed the instant action.

DISCUSSION

Defendant seeks dismissal of the complaint, contending that res judicata bars Hightower's claims in the instant action because he was required to raise them, if at all, in the prior state court action. The Court agrees.

The "threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Quality Foods de Centor America S.A. v. Latin America Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983). In evaluating the motion, a court must accept as true all allegations contained in the complaint and must view the complaint in the light most favorable to the plaintiff. *See Peterson v. Atlanta Housing Auth.*, 998 F.2d 904, 912 (11th Cir. 1993). Thus, a court can dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) only when a plaintiff "can prove no set of facts which would entitle him to relief." *Martinez v. American Airlines, Inc.*, 74 F.3d 247, 248 (11th Cir. 1996).

Federal res judicata "bars a subsequent claim when a court of competent jurisdiction entered a final judgment

on the merits of the same cause of action in a prior lawsuit between the same parties." *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356 (11th Cir. 1998). Determining whether a party has asserted the same cause of action in two proceedings requires an examination of the factual issues in both cases, because "[r]es judicata acts as a bar not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact." *Id.* at 1356 (internal quotation omitted).

Georgia's codification of res judicata[1], O.C.G.A. § 9-12-40, similarly provides that "[a]judgment of a court of competent jurisdiction shall be conclusive between all parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside." Three prerequisites must be met for res judicata to apply: "(1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction." *Waldroup v. Greene County Hospital Auth.*, 265 Ga. 864, 866 (1995).

Construing the complaint in the light most favorable to Hightower, it is clear that defendant's conduct relating to Hightower's termination spawned both the instant and

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[1] It is unclear in this circuit whether federal or Georgia res judicata principles apply to actions such as this. *See Pleming*, 142 F.3d at 1356 n.1. However, the Court concludes that dismissal of Hightower's complaint is appropriate under either federal or Georgia res judicata principles, because both require the causes of action in the first and second lawsuits to be the same.

the prior lawsuits. The claims for injury to ability to earn a living and defamation in the instant action arise from the same operative nucleus of fact (the circumstances surrounding Hightower's termination) as the wrongful termination claims in the prior state court action. Further, both lawsuits contain identical parties, and the prior final judgment was on the merits and entered by a court of competent jurisdiction. Therefore, both lawsuits concern the same cause of action, and Hightower was required to bring all of his claims relating to his termination in the prior state court action. Accordingly, Hightower's instant complaint must be dismissed with prejudice.

Defendant also moves for sanctions under Federal Rule of Civil Procedure 11. The Court declines imposing such sanctions on this *pro se* plaintiff.

CONCLUSION

For the reasons stated above, the Court GRANTS defendant's motion to dismiss [8-1] and DENIES defendant's motion for sanctions [8-2]. The Clerk of the Court is DIRECTED to dismiss the claims against defendant with prejudice, and to close this case.

It is so ORDERED this 4 day of September, 1998.

/s/ Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge, United States
District Court

CLAIMS EXAMINER'S DETERMINATION

08/29/95

CWB 08/27/95

SSN 256-90-5305

FIELD SERVICE OFFICE:
3500
SOUTH METRO
2636-14 MLK JR. DRIVE
ATLANTA, GEORGIA
30311

CLAIMANT
DAVID T. HIGHTOWER
1665 WESTWOOD AVE.
ATLANTA GA 30310

EMPLOYER
THE KENDALL
COMPANY
% GATES MCDONALD
PO BOX 1944
COLUMBUS OH 43216

SECTION 1 - CLAIM DETERMINATION

Benefits are allowed as of 08/27/95.

SECTION II - LEGAL BASIS FOR DETERMINATION

The Employment Security Law at OCGA Section 34-8-194 paragraph (2)(A) requires disqualification if the individual has been discharged or suspended from work with the most recent employer for failure to obey orders, rules, or instructions or for failure to discharge the duties for which the individual was employed. To requalify following a disqualification, an individual must secure subsequent employment for which the individual earns insured wages equal to at least ten times the weekly benefit amount of the claim and then becomes unemployed through no fault on the part of the individual. The burden of proof of just discharge or suspension for cause

as set forth shall be on the employer and the presumption shall be with the employee.

SECTION III – REASONING

CLAIMANT WAS DISCHARGED AND ACCUSED OF BEING NEGLIGENT IN PERFORMING HIS/HER DUTIES. CLAIMANT INSISTS THAT DUE PRECAUTION WAS TAKEN AND HE/SHE PERFORMED THE JOB WITH THE SAME CARE AS ALWAYS. INFORMATION FALLS TO SHOW CLAIMANT COULD HAVE PREVENTED THE INCIDENT WHICH CAUSED THE DISCHARGE OR THAT HE/SHE WAS AT FAULT IN THE SEPARATION. BENEFITS ARE ALLOWED.

SECTION IV – ACCOUNT CHARGEABILITY

NOTICE TO EMPLOYER:

SECTION V – APPEAL RIGHTS

NOTE: Unless a written appeal is filed, the nonmonetary determination shown in Section I above becomes final 15 days following the RELEASE DATE shown below. If you file an appeal you must continue to report on your claim as instructed in order to be paid should you win your appeal.

REVA YVONNE PADEN
Claims Examiner

09/18/95
Date of Interview

09/19/95
Release Date

SECRETARY OF STATE
Corporations Division
Suite 315, West Tower
2 Martin Luther King Jr., Dr.
Atlanta, Georgia
30334-1530

DOCKET NUMBER:
981550554
CONTROL NUMBER:
7856128
DATE INC/AUTH:
07/20/1972
JURISDICTION:
DELAWARE
DATE DISS/REV:
07/06/1997
PRINT DATE:
06/04/1998
FORM NUMBER:
219

CERTIFICATE OF FACT

I, Lewis A. Massey, the Secretary of State of the State of Georgia, do hereby certify under the seal of my office that

THE KENDALL COMPANY
A FOREIGN PROFIT CORPORATION

was mailed a notice in accordance with Title 14 of the Official Code of Georgia Annotated and was involuntarily or administratively dissolved or revoked by the Office of the Secretary of State on the date stated above for failure to file its annual registration.

This certificate is issued pursuant to Title 14 of the Official Code of Georgia Annotated and is prima-facie evidence of the existence or nonexistence of the facts stated herein.

/s/ Lewis A. Massey
LEWIS A. MASSEY
SECRETARY OF STATE

[SEAL]

In the United States Court of Appeals
for the Eleventh Circuit

David T. Hightower, Sr. Plaintiff	)	No. 99-8043
v.	)	Filed July
THE KENDALL COMPANY, an unincorporated division of TYCO INTERNATIONAL (US) INC. Defendant	)	15, 1999

Appeal from the United States District Court for the Northern District of Georgia

Before DUBINA, CARNES and HULL Circuit Judges.

BY THE COURT This appeal is dismissed for lack of jurisdiction. Appellant David T. Hightower's Dec. 29, 1998, notice of appeal was untimely because it was not filed within 30 days of the entry of the Oct. 19, 1998, order denying Hightower's motion for reconsideration. FRCP 4(a)(1)(A) & 4(a)(4) Hightower's Nov. 2, 1998, motions were untimely and successive, and therefore did not toll the appeal period. See Advanced Estimating System Inc, v. Riney, 77 F.3d 1322,1323 (11th Cir. 1990), cert. denied, 502 U.S. 1049 (1992). Futhermore, this Court lacks authority to extend the appeal period based upon excusable neglect. See FRCP 4(a)(5); Reynolds v. Hunt Oil Co., 643 F.2d 1042-43 (5th Cir. 1981).